IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 8TH OCTOBER 2007 / 16TH ASWINA 1929

SA.No. 601 of 1994(E)

AS.132/1991 of I ADDL.SUB COURT,ERNAKULAM
OS.367/1988 of PRINCIPAL MUNSIFF'S COURT, ERNAKULAM
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APPELLANTS:REPONDENTS:DEFENDANTS:

***1. THOMAS VARGHESE ALIAS PARAYIL VARGHESE, AGED 70, PARAYIL HOUE, PUTHUMANOOR KARA, PUTHENCRUZ VILLATE, PUTHENCRUZ P.O. (D I E D).**

2. SAJAN P.VARGHESE, S/O.THOMAS VARGHESE, AGED 42, PARAYIL HOUSE, PUTHUMANOOR KARA, PUTHENCRUZ VILLAGE, PUTHENCRUZ P.O.

***1ST APPELLANT DIED. 2ND APPELLANT IS LEGAL HEIR OF 1ST APPELLANT AS PER ORDER DTD. 12/09/07.**

BY ADV. SRI.T.N.HAREENDRAN

RESPONDENT:APPELLANT:PLAINTIFF:

S.NARAYANA PILLAI, S/O.SREEDHARA PILLAI, AGED 48, MOGAYIL HOUSE, NOW RESIDING AT QTR. NO.534/10, F.A.C.T. C.D., AMBALAMEDU.

BY ADV. SRI.VARGHESE C.KURIAKOSE
SRI.BIJU M.JOHN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.1216/1994 IN S.A.NO.601/1994

DISMISSED

08/10/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 601 OF 1994

Dated 8th October 2007

J U D G M E N T

Defendants in O.S.No.367 of 1988 on the file of Munsiff court, Ernakulam are the appellants. Plaintiff is the respondent. First appellant died subsequent to the filing of the appeal and second appellant was recorded as his legal heirs. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property belongs to him and is in his possession as per Ext.A2 order in land assignment in P.F.33/1978 as per which Ext.A1 patta was issued to him. It was contended that 18 cents of that property was encroached upon by Thankamma and respondent instituted O.S.314/1982 before Munsiff court, Ernakulam seeking a decree for recovery of possession and it is pending when the suit was filed. Contending that appellants attempted to trespass into the plaint schedule property, decree for permanent prohibitory injunction was sought. Appellants filed written statement

contending that respondent did not obtain possession of the property covered under Ext.A1 patta and they are not aware of institution of O.S.314/1982 and adjacent land lying on southern side of the property held by Thankamma is under the ownership and possession of the appellants and under Ext.B5 patta was granted in P.F.18/1978 to John Varghese and under Ext.B4 assignment deed dated 7/3/1983 appellants purchased the same and since then they have been in possession of the property and respondent is not entitled to the decree sought for. Learned Munsiff on the evidence of Pws.1 to 3, Dws.1 to 4, Exts.A1 to A13, B1 to B7 and C1, dismissed the suit holding that respondent did not establish possession of the property. Respondent challenged the decree and judgment before Sub court, Ernakulam in A.S.132 of 1991. Learned Sub Judge on re-appreciation of evidence found that dispute between the parties is whether respondent obtained property covered under Ext.A1 and whether property covered under Exts.B5 and A1 are the same properties. Learned Sub Judge found that PW2, the Special Tahasildar, who was examined before the court deposed that on the basis of the report submitted by Village Officer he conducted an enquiry and passed Ext.A10 order finding that respondent is in

possession of the property covered under Ext.A1 and therefore Ext.A1 is not to be cancelled. Learned Sub Judge on such re-appreciation of evidence found that respondent has established possession of the property and granted a decree for permanent prohibitory injunction. Judgment is challenged in this appeal. Appeal was admitted formulating the following substantial question of law.

> Whether first appellate court was justified in granting a decree for permanent prohibitory injunction when under Ext.B5 patta 67 cents was assigned to the predecessor in interest of the appellants, earlier to the granting of Ext.A1 patta to respondent.

2. Learned counsel appearing for appellants and respondent were heard.

3. Argument of learned counsel appearing for appellants is that when Ext.B5 patta was granted to John Varghese, the assignor under Ext.B4 on 1/11/1978, Ext.A1 patta was granted only on 8/12/1978 and when patta in respect of 67 cents in survey No.550/1 to 4 of Chemmanadu village was already assigned to John Varghese under Ext.B5. But under Ext.A1 patta was granted pursuant to Ext.A2 assignment order. Therefore before

Ext.B5 patta was granted to John Varghese on 1/11/1978, under Ext.A2 assignment order dated 20/9/1978 in P.F.33/1978, respondent was assigned one acre of the property comprised in Ext.A1 patta. Therefore, on the ground that date of Ext.B5 patta is earlier to Ext.A1 patta, appellant is not entitled to contend that respondent did not obtain right over the property covered under Ext.A1. Ext.A2 is earlier to Ext.B5.

4. As suit is only for injunction, question is only with regard to possession of the property. Question of title as such is not to be decided in the suit. Though trial court, on appreciating evidence found that respondent did not establish possession, first appellate court on re-appreciation of evidence found that respondent has established possession. Argument of learned counsel appearing for appellants is that said appreciation of evidence is unsustainable. In exercise of powers of this court under Section 100 of Code of Civil Procedure, appreciation of evidence by last fact finding court cannot be interfered by re-appreciating the evidence. It is not for this court to re-appreciate the evidence and substitute the finding of fact arrived at by the first appellate court. Though learned counsel appearing for

appellants vehemently argued that evidence is to be re-appreciated, I cannot agree with the submission.

5. Before the trial court PW2 Special Tahsildar, who granted both Exts.A1 and B5 patta was examined. Evidence of PW2 establish that pursuant to the report submitted by the Village officer, on the basis of allegation that property covered under Exts.A1 and B5 are the same, PW2 had conducted enquiry and Ext.A2 order was passed finding that Ext.A1 patta is genuine and respondent is in possession of the property. That evidence was relied upon by first appellate court. It cannot be said to be perverse. In the light of the evidence on record, I do not find any reason to interfere with the finding of fact arrived at by first appellate court. As respondent established his possession of the property, he is entitled to the decree granted by trial court. It is made clear that appellants are entitled to work out their remedy on the strength of Ext.B5 order in appropriate proceeding.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.601 OF 1994

8th October 2007

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